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Case No.: S122865

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BARBARA LEWIS, CHARLES MCILHENNY, and EDWARD MEI,
Petitioners,

v.

NANCY ALFARO, County Clerk of the City and County of San Francisco in her official capacity,
Respondent.

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE; PROPOSED BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENT

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Pursuant to rule 14(c) and rule 29.3(c) of the California Rules of Court, Del Martin and Phyllis Lyon, Sarah Conner and Gillian Smith, Margot McShane and Alexandra D'Amario, Dave Scott Chandler and Jeffery Wayne Chandler, Theresa Michelle Petry and Cristal Rivera-Mitchel, Lancy Woo and Cristy Chung, Joshua Rymer and Tim Frazer, Jewell Gomez and Diane Sabin, Myra Beals and Ida Matson, Arthur Frederick Adams and Devin Wayne Baker, Jeanne Rizzo and Pali Cooper, Our Family Coalition, and Equality California ["Amici"] respectfully seek leave to file the attached Brief of Amici Curiae in Support of Respondent in the above-captioned proceeding.

Applicants are familiar with the questions involved in the above-captioned case and the scope of their presentation, *see* rule 14(c) of the California Rules of Court, and believe that there is a necessity for additional argument on those matters. Amici are same-sex couples and two membership organizations with many same-sex couples and their families who will be directly affected both by any action by this Court upon the writ petitions seeking to compel Respondent to apply state statutes that exclude same-sex couples from the right to marry, and also by this Court's resolution of the underlying issue of whether California's statutory exclusion of same-

sex couples from the right to marry is constitutional. Amici have a strong interest in ensuring that this underlying constitutional issue is considered and resolved in a properly presented case, after development of a factual and legal record that will assist this Court in fully and fairly analyzing this important matter of great public concern.

INTERESTS OF AMICI CURIAE

Amici include four same-sex couples who have recently married in San Francisco, and six couples who had planned to marry but were unable to do so because of Respondent's compliance with this Court's Order of March 11, 2004. The former group of Amici couples are respondent-intervenors and cross-complainants in two consolidated cases now stayed by this Court, *Thomasson v. Newsom*, San Francisco Superior Court Case No. 428794, and *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco*, San Francisco Superior Court Case No. 503943, filed by various organizational and taxpayer plaintiffs seeking to enjoin San Francisco officials from continuing to issue marriage licenses to same-sex couples.

The latter group of Amici are plaintiffs/petitioners in *Woo v. Lockyer*, San Francisco Superior Court Case No. 504038, an action filed on March 12, 2004, against state officials responsible for the implementation and

enforcement of California's marriage laws, challenging the constitutionality of the statutory exclusion of same-sex couples from the right to marry.

Amicus Our Family Coalition is an organization dedicated to promoting the civil rights and well-being of families with lesbian, gay, bisexual and transgender members through education, advocacy, social networking, and community organizing. Our Family Coalition has a membership of more than 500 families and hundreds of individuals and organizations throughout the San Francisco Bay Area. Many of Our Family Coalition's members have married their same-sex partners in San Francisco, and many other members had planned to marry but were prevented from doing so by Respondent's compliance with this Court's March 11 Order. Our Family Coalition is a plaintiff/petitioner in the *Woo* action.

Amicus Equality California is the leading state-wide advocacy group protecting the interests of same-sex couples and their children in California. It is California's largest lesbian, gay, bisexual and transgender civil rights organization, with thousands of members throughout the state. Many Equality California members have married their same-sex partners in San Francisco, and many other members had planned to do so but were prevented from marrying by Respondent's compliance with this Court's March 11 Order. Equality California is the sponsor of the Marriage License

Non-Discrimination Act, A.B. 1967 (2004), authored by Assemblymember Mark Leno, which is presently before the California Legislature. As sponsor of this bill, and of prior domestic partnership legislation, Equality California and its members have assumed a continuing role in educating the public about the rights, responsibilities, and dignity that same-sex couples are denied by being excluded from marriage. Equality California is a respondent-intervenor and cross-complainant in the *Thomasson* and *Proposition 22* actions and a plaintiff/petitioner in the *Woo* action. Equality California is also an intervenor/petitioner in *Tyler v. County of Los Angeles*, Los Angeles Superior Court Case No. BS 088506, an action filed on February 20, 2004 by two same-sex couples seeking relief against the County of Los Angeles for refusing to issue marriage licenses to them.[1]

[1] This action has been stayed by order of the court until June 18, 2004.

PROPOSED BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENT

I. INTRODUCTION AND SUMMARY OF ARGUMENT

For the reasons set forth below, Amici urge the Court to defer consideration of the issue presented by the writ petitions – whether article III, section 3.5 of the California Constitution applies to Respondent and prevents her from declining to enforce California's statutory exclusion of same-sex couples from marriage based on Respondent's determination that this exclusion is unconstitutional – until this Court has had an opportunity to consider and decide in a properly presented case the underlying question of the constitutionality of the marriage restriction.

There is no immediate need for this Court to decide the municipal authority issue. As of March 11, 2004, this Court has ordered the San Francisco officials to enforce the statutory restriction on marriage and to cease issuing marriage licenses to same-sex couples, and Respondent has complied with that order. Under basic principles of judicial economy, this Court should avoid unnecessary and premature decisions on constitutional issues.

California's courts *cannot avoid* deciding whether the marriage restriction violates the California Constitution, not only because the municipal authority issue cannot properly be resolved without addressing this question, but also, and more importantly, because the *Woo* case, currently pending in San Francisco Superior Court, directly challenges the constitutionality of the marriage statutes and seeks writ relief that would permit same-sex couples to marry throughout the state. That litigation will likely soon be before this Court.

However, this Court *can and should avoid* an unnecessary decision on the municipal authority issue, because that issue will be rendered moot by a judicial decision that California's statutory exclusion of same-sex couples from marriage either does or does not violate the California Constitution.

This Court should avoid an unnecessary decision on the municipal authority issue for another reason, as well. As argued in Respondent's brief, the weight of authority in this state strongly supports the power, and indeed the duty, of public officials to comply with constitutional norms, even when doing so means declining to enforce a state statute. While the judiciary is of course the ultimate arbiter of what is constitutional, each of the two other branches also has an independent obligation to comply with the California Constitution. This Court wisely has refrained from adopting a rigid or

formulaic approach to the dynamic interplay among these independent duties in the past.

Specifically, the Court never has held that a public official is categorically barred from declining to enforce a statute that appears to violate the state constitution, regardless of the circumstances, unless an appellate court has ruled that the statute is invalid. Rather, when a public official has declined to enforce a statute he or she believes to be unconstitutional, the Court simply has determined whether the official's determination was correct and issued the appropriate relief. *See, e.g.*, *California Educational Facilities Authority v. Priest*, 12 Cal. 3d 593 (1974) (affirming the constitutional validity of a state law relating to educational bonds and holding that the State Treasurer was therefore required to comply with it). In sum, this Court has exercised its responsibility as the ultimate arbiter of what is constitutional in specific cases, but it wisely has not attempted to enunciate general rules limiting the ability of public officials to exercise their independent duty to uphold the constitution.

Such restraint is especially prudent in a case such as this one, involving the rights of a minority group whose dignity has only recently been recognized by the Nation's highest Court and whose families are only beginning to be welcomed as full citizens by a growing number of states.

Our Nation's civil rights history is replete with instances in which legislative correction has trailed behind judicial and executive leadership in matters of evolving constitutional principle. Considering our history, this Court can have no confidence that any worthwhile goal – whether justice, order, or security – would be well served by attempting to resolve the municipal authority question posed here in the abstract, without regard to the underlying question about the constitutionality of excluding same-sex couples from marriage. There is no reason to depart from the Court's usual approach, which would be to resolve the validity of the allegedly unconstitutional statute, simply because the issue involved has garnered an unusual degree of public attention. Accordingly, the Court should not unnecessarily or prematurely decide whether article III, section 3.5 applies to Respondent – especially given that the issue of Respondent's authority soon will be rendered moot by a now-inevitable and imminent judicial determination on the merits of the underlying marriage question.

II. FACTUAL AND PROCEDURAL BACKGROUND

On February 10, 2004, San Francisco Mayor Gavin Newsom issued a public statement indicating that, based on his analysis of the California Constitution and on his review of a series of recent appellate or high court decisions from Massachusetts and other jurisdictions, he had concluded that

excluding same-sex couples from the right to marry violates the equality guarantees of the California Constitution. On February 12, 2004, Mayor Newsom directed the County Clerk to begin issuing marriage licenses on an equal basis to same-sex and different-sex couples. Since that date, more than 4,000 same-sex couples have obtained marriage licenses in San Francisco, including four of the Amici couples, and many members of Amici Our Family Coalition and Equality California.

On March 11, 2004, this Court ordered Respondent to show cause why a writ of mandate should not issue, directing her to apply and to abide by the statutory provisions restricting marriage to different-sex couples. Pending this Court's determination of the matter, this Court ordered Respondent to enforce and apply the statutory restrictions on marriage. Respondent immediately complied with the March 11 Order.

This Court's Order of March 11, 2004 also stayed all proceedings in the *Thomasson* and *Proposition 22* cases in San Francisco Superior Court in which organizational and taxpayer plaintiffs sought to enjoin San Francisco officials from continuing to issue marriage licenses to same-sex couples. However, the Order provided that "[t]his stay does not preclude the filing of a separate action in superior court raising a substantive constitutional challenge to the current marriage statutes."

On March 12, 2004, Amici Lancy Woo and Cristy Chung, Joshua Rymer and Tim Frazer, Jewelle Gomez and Diane Sabin, Myra Beals and Ida Matson, Arthur Frederick Adams and Devin Wayne Baker, Jeanne Rizzo and Pali Cooper, Our Family Coalition, and Equality California filed a new action, *Woo v. Lockyer*, seeking declaratory and injunctive relief and a writ of mandate against state officials responsible for enforcement of the marriage statutes. The *Woo* case directly presents the constitutional question that underlies the issues in this writ proceeding – whether the statutory exclusion of same-sex couples from marriage violates the California Constitution's guarantees of equal protection, due process and privacy. In addition, the City and County of San Francisco has filed a lawsuit in San Francisco Superior Court against the State of California challenging the marriage exclusion as unconstitutional. A motion to consolidate that case with the *Woo* case is set to be heard on April 1, 2004.

III. ARGUMENT

A. Decision of the municipal authority issue is unnecessary and should be avoided because that issue soon will be rendered moot by judicial decision of the underlying constitutional question, regarding marriage of same-sex couples, in writ proceedings now pending in San Francisco Superior Court.

It is a basic rule of judicial restraint, as well as judicial economy, that the courts should not decide constitutional questions unnecessarily or

prematurely. *People v. Williams*, 16 Cal. 3d 663, 667 (1976) ("we do not reach constitutional questions unless absolutely required to do so to dispose of the matter before us"); *Palermo v. Stockton Theatres*, 32 Cal. 2d 53, 65 (1948) (constitutional issues will be resolved on appeal only if "absolutely necessary").

There are two primary constitutional issues that are, or soon will be, before this Court: (1) whether article III, section 3.5, of the California Constitution applies to Respondent and prevents her from declining to enforce statutes that she has determined to be unconstitutional; and (2) whether California's statutory exclusion of same-sex couples from the right to marry violates the equal protection, due process, and privacy rights guaranteed by the California Constitution.

The first constitutional issue is avoidable; the second is not. Regardless of whether and how this Court decides the municipal authority issue, California's courts will have to decide, in writ proceedings now progressing in San Francisco Superior Court, whether the marriage restriction is constitutional. In contrast, if this Court were to refrain from ruling on the municipal authority issue and instead await a judicial determination of the constitutionality of the marriage restriction on a proper record in the superior court cases now pending, the municipal authority issue

would be moot. If the statutory exclusion of same-sex couples from marriage were to be declared *unconstitutional*, then Respondent could not be ordered to enforce the exclusion in the future – rendering irrelevant the issue of the legality of Respondent's prior actions. If the marriage exclusion were to be declared *constitutional*, then the municipal authority issue still would be moot, because San Francisco is a party to the marriage litigation now progressing in San Francisco Superior Court, and Respondent has not asserted and cannot assert any right to refuse to enforce the marriage restriction in defiance of a contrary judicial order or appellate court decision.

Under basic principles of judicial economy, this Court should defer consideration of the municipal authority issue presented by this case until the underlying issue of the constitutionality of the marriage restriction is properly presented to this Court.[2] There is no urgent need to decide the municipal authority issue, given that this Court has ordered San Francisco officials to enforce the marriage restriction while this action is pending, and Respondent is complying with that order. Respondent's briefing before this Court highlights that the municipal authority issue is complex and involves numerous constitutional questions with potential implications reaching far

[2] As already noted, the *Woo* Amici filed a writ petition directly challenging the unconstitutionality of excluding same-sex couples from marriage on March 12, 2004 in San Francisco Superior Court. A hearing to consolidate that case with a similar writ petition filed by the City and County of San Francisco is set for April 1, 2004.

beyond the current dispute concerning the marriage restriction. This Court should avoid an unnecessary decision on these complex constitutional issues.

Moreover, as discussed *infra* in section III.B, this Court *cannot* properly resolve the municipal authority issue without considering the constitutionality of the marriage statutes. This Court should not take up such an important issue without the benefit of a fully developed record at the trial court level. The constitutional issues regarding the marriage statutes involve complex questions of both law and fact. It would be precipitous and unwise to address these issues in an original writ proceeding in which they are raised only obliquely.

B. This Court cannot properly decide the municipal authority issue without addressing the constitutionality of the statutory restriction on marriage.

As this Court's prior case law makes clear, the Court cannot properly or meaningfully decide whether Respondent had the authority to decline to enforce the statutory exclusion of same-sex couples from marriage, without addressing the constitutionality of that exclusion. When an official refuses to enforce a statute, judicial scrutiny of that decision is readily available through a petition for writ of mandate. *See, e.g., California Housing Finance Agency v. Elliott*, 17 Cal. 3d 575, 579 (1976) (holding that mandate

is the proper remedy to compel a public official to comply with a statute). Because this procedure is readily available and ensures that public officials are subject to prompt judicial oversight, this Court has never felt it necessary to establish a rigid rule that public officials must *always await* judicial determinations of unconstitutionality before declining to enforce constitutionally questionable statutes.

To the contrary, when presented with cases in which public officials have refused to enforce statutes they believe to be unconstitutional, this Court and lower courts simply have examined the statutes at issue, together with the well-developed arguments for and against their validity, determined whether the statutes are constitutional, and either granted or denied the writ relief requested, based on those determinations. *See, e.g., California Educational Facilities Authority*, 12 Cal. 3d 593 (1974) (determining whether the California Educational Facilities Act violated the state constitution); *Board of Supervisors v. Dolan*, 45 Cal. App. 3d 237 (1975) (determining whether the Mark-Foran Rehabilitation Act violated the state constitution); *Bayside Timber Co. v. Board of Supervisors*, 20 Cal. App. 3d 1 (1971) (determining whether the Forest Practice Act violated the state constitution); *City of Oakland v. Digre*, 205 Cal. App. 3d 99 (1988) (determining whether city parcel tax violated the state constitution).

There is no need or justification for this Court to declare that in all instances, no matter how strongly a judicial trend points to the unconstitutionality of a statute, a local official nevertheless must continue to enforce that statute and place on the private citizens affected the burden and expense of affirmatively challenging the statute. The writ procedure, combined with the Legislature's provision for taxpayer standing to challenge local actions alleged to be contrary to law pursuant to Cal. Civ. Proc. Code § 526(a), provides an important check on local officials in this respect, and helps ensure a balance between the possibility that unconstitutional statutes will go unchallenged and the risk that local officials will abuse their positions.

It has been healthy both for our Nation and for the State of California that public officials throughout our history have taken seriously their own individually sworn constitutional duties. *See, e.g.*, F. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 928 (1990) (noting that it has often been necessary for legislative and executive officials to decide whether a law is unconstitutional or not and act accordingly, pending authoritative resolution by a court). The likelihood that the public good will continue to be served by leaving public officials some flexibility in this regard is great, while the benefits of departing from this Court's

longstanding hesitation to lay down hard and fast rules that would tie the hands of all public officials in all situations are speculative and uncertain at best. This Court should continue to adhere to that tradition of judicial caution in this case.

In addition, the relief requested from this Court, a writ of mandate, cannot be used to compel a local official to perform an act that is unconstitutional. *See Cook v. Noble*, 181 Cal. 720, 721 (1919) ("[I]t is well settled that mandamus will not lie to compel the performance of acts which are illegal, contrary to public policy, or which tend to aid an unlawful purpose."); 43 Cal. Jur. 3d Mandamus and Prohibition, sec. 5 (2003) ("A writ of mandamus should not issue where its enforcement would . . . compel the performance of acts that are illegal or contrary to public policy"). Therefore, even if this Court were to decide that San Francisco officials are subject to article III, section 3.5, or otherwise lacked authority to act upon their own determination of the unconstitutionality of California's exclusion of same-sex couples from marriage, this Court could not grant the relief requested by Petitioners without addressing the underlying marriage question.

In this case, given the analysis of the U.S. Supreme Court in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) and of the Massachusetts

Supreme Judicial Court in *Goodridge v. Department of Public Health*, 440 Mass. 309 (Mass. 2003) – as well as this Court's historic leadership on questions of marriage equality – there is every reason to expect that San Francisco and its elected officials will prove to have been correct in their determination that the statutory exclusion of same-sex couples from the right to marry is unconstitutional.

Accordingly, any decision by this Court to issue writ relief against Respondent here, while turning a blind eye to the serious constitutional questions raised by the discriminatory statute at issue in the writ, would risk implicating this Court in violating the constitutional rights of thousands of lesbians and gay men, while simultaneously forcing San Francisco officials to cooperate in such constitutional deprivations.

This possibility makes plain why the principle that courts cannot order a public official to perform an unconstitutional act takes on special significance in cases where the rights of vulnerable minorities are at stake. In this case, Respondent sought to protect the constitutional rights of lesbians and gay men by refusing to enforce a state law that blatantly discriminates against them. It would be irresponsible, and contrary to the established public policy of this state, which is to eliminate discrimination against lesbian, gay and bisexual people, for the Court to resolve this case as

though those constitutional rights are not of utmost importance and in need of vigilant protection. *See, e.g., People v. Garcia*, 77 Cal. App. 4th 1269, 1279 (2000) ("Outside of racial and religious minorities, we can think of no group which has suffered such 'pernicious and sustained hostility' . . . and such 'immediate and severe opprobrium' as homosexuals.").

C. The restriction of marriage to different-sex couples in California's marriage statutes is unconstitutional, so a writ of mandate may not issue to compel the San Francisco officials to enforce that restriction.

Because Amici contend that this Court should defer consideration of the constitutionality of California's statutory exclusion of same-sex couples from marriage until this issue is properly presented after development of a full factual and legal record, and because this Court's Order of March 11, 2004 states that briefing in this action should be "limited to the legal question whether respondent is exceeding or acting outside the scope of her authority," Amici will only summarize here the ways in which the marriage restriction violates the California Constitution.[3]

[3] Amici's arguments on the merits of the constitutional issues are set forth fully in the Opposition to Original Petition for Writ of Mandate lodged with this Court by Proposed Intervenor-Respondents on March 5, 2004; this brief was not filed because the motion to intervene was denied. If this Court decides to reach the question whether the marriage statutes are constitutional in this action, Amici respectfully request leave to submit supplemental briefing.

This Court has long recognized that the right to marry is a "fundamental right" that is "essential to the orderly pursuit of happiness by free men." *Perez v. Sharp*, 32 Cal. 2d 711, 714 (1948) (citation omitted). As a result, legislation addressing the right to marry "must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws." *Perez*, 32 Cal. 2d at 715. Every state supreme court to have considered the question over the last decade has found that restricting marriage to different-sex couples violates constitutional guarantees of equal protection and/or due process. *See Goodridge*, 440 Mass. 309 (Mass. 2003); *Baker v. State*, 170 Vt. 194 (Vt. 1999); *Baehr v. Lewin*, 74 Haw. 530 (Haw. 1993).

The restriction of marriage to different-sex couples in California's marriage statutes is subject to – and must inevitably fail – strict scrutiny under the California Constitution's guarantees of equal protection, due process, and privacy. Any state law that deprives persons of equal rights and benefits or relegates persons to second-class status, based on suspect classifications, is subject to strict scrutiny under the California Constitution. *Catholic Charities of Sacramento, Inc. v. Superior Court*, No. S099822, 2004 WL 370295, at *21 (Cal. 2004). The statutory restriction of marriage to different-sex couples, whether it is viewed as a sex-based or sexual

orientation-based classification, is inherently suspect and may be upheld only if it is shown to be necessary to advance a compelling state interest. The restriction on marriage is also subject to strict scrutiny because it burdens the exercise of a fundamental right, and because it infringes on the right to privacy explicitly guaranteed by the California Constitution.

No party in this case has identified any compelling state interest in excluding same-sex couples from the right to marry; nor could they, because none exists. There is no legitimate state interest that would survive rational basis scrutiny – much less a compelling state interest that would survive strict scrutiny – in excluding same-sex couples from marriage. California's domestic partnership laws, including provisions of A.B. 205 (2003) that will go into effect in January 2005, grant same-sex domestic partners almost all of the rights and duties of spouses. The legislative findings accompanying A.B. 205 (2003), ch. 421, § 1(b) recognize that "many lesbian, gay, and bisexual Californians have formed lasting, committed, and caring relationships with persons of the same sex. These couples share lives together, participate in their communities together, and many raise children and care for other dependent families members together." The Legislature also expressly found that "[e]xpanding the rights and creating responsibilities of registered domestic partners would further California's

interests in promoting family relationships and protecting family members during life crises, and would reduce discrimination on the basis of sex and sexual orientation in a manner consistent with the requirements of the California Constitution." *Id.*

In light of these legislative findings and California's current domestic partnership laws, the State cannot coherently assert any interest in denying comprehensive legal protections to same-sex couples and their dependent family members – concerning matters such as parent-child relationships, child custody, visitation and support, property, inheritance, health and retirement benefits, or medical decision-making. Thus, the only remaining question is what state interests possibly can be advanced to justify maintaining separate legal systems for same-sex and different-sex couples. The Supreme Judicial Court of Massachusetts recently considered this question and concluded that the only conceivable purpose of protecting same-sex couples through a comprehensive but different system, while continuing to exclude them from marriage, would be the maintenance of a distinction for its own sake, to preserve a segregated status for gay and lesbian couples. *In re Opinions of the Justices to the Senate*, 440 Mass. 1201 (Mass. 2004) (holding that providing same-sex couples with a separate legal status entitled "civil unions," rather than permitting such couples to

marry, was inherently discriminatory). As the Massachusetts high court correctly concluded, such a purpose is in itself unconstitutional. *Id.* at 1207 ("The dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex . . . couples to second-class status.").

Maintaining a separate, second-class status for same-sex couples deprives them and their families of equal respect and dignity, and of the innumerable practical benefits of entering into a universally recognized and privileged institution. This is exactly the kind of "classification of persons undertaken for its own sake" that violates the constitutional right to equal protection. *Lawrence*, 123 S. Ct. at 2486 (2003) (quoting *Romer v. Evans*, 517 U.S. 620, 635 (1996)). Conversely, eliminating this second-class status and allowing same-sex couples equal access to civil marriage would not harm California's different-sex married couples or deprive anyone of the rights and responsibilities of marriage, and would not in any way jeopardize the state's interests in social stability, the well-being of children, or public respect for the institution of marriage. Instead, like this Court's abolition of race restrictions in *Perez*, it will strengthen and revitalize the institution of marriage in California by ending an arbitrary and prejudicial restriction that excludes and stigmatizes thousands of California couples and their families.

For these reasons, Amici believe that this Court ultimately must conclude that the marriage restriction is unconstitutional. At the very least, there are serious and complex questions regarding the constitutionality of California's statutory exclusion of same-sex couples from marriage, which should be resolved by this Court upon a fully developed factual and legal record in a case that presents those questions directly. Two such cases are pending now in San Francisco Superior Court, and this Court should await their resolution rather than decide the municipal authority question presented in the writ petitions now before this Court.

IV. CONCLUSION

This Court cannot properly decide whether a writ should issue to compel Respondent to enforce the statutory exclusion of same-sex couples from marriage without resolving whether that exclusion is constitutional. Even if it were possible to sever the municipal authority issue from the underlying constitutional question, it would be unnecessary, premature, and a waste of judicial resources to do so.

Therefore, Amici urge this Court to refrain from issuing a writ and to defer resolution of the municipal authority issue presented by the writ petitions, until the underlying issue whether California's statutory exclusion

of same-sex couples from marriage is unconstitutional has been properly presented to and decided by this Court.

Dated: March 25, 2004

Respectfully submitted,

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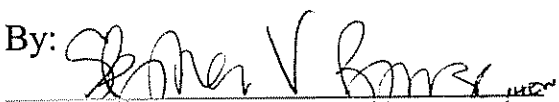
By: 
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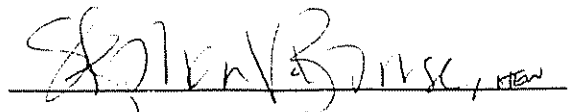
CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 14(c)(1), I certify that, based on the word count function of the application used to write the brief, the foregoing brief contains 4,939 words including footnotes.

DATED: March 25, 2004



Stephen V. Bomse

PROOF OF SERVICE

I, Joanne Park, declare that I am over the age of eighteen years and I am not a party to this action. My business address is 333 Bush Street, San Francisco, California 94104-2878.

On March 25, 2004, I served the document listed below on the interested parties in this action in the manner indicated below:

DOCUMENT SERVED:

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE; PROPOSED BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENT

[ ] BY OVERNIGHT DELIVERY: I caused such envelopes to be delivered to the above parties via FEDERAL EXPRESS PRIORITY OVERNIGHT delivery service.

[ ] BY PERSONAL SERVICE: I caused the document(s) to be delivered by hand.

[X] BY MAIL: I am readily familiar with the business practice for collection and processing correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelopes were sealed, and with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at San Francisco, California. I caused the document(s) to be sent by mail via United States Postal Service to the parties identified above.

[X] BY FACSIMILE: By use of facsimile machine, I served a copy of the above listed document(s) on the above-listed interested parties in the within action by transmitting by facsimile machine to the following: The facsimile machine I used complied with California Rules of

Court, Rule 2003(3) and no error was reported by the machine. Pursuant to California Rules of Court, Rule 2005, I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

INTERESTED PARTIES:

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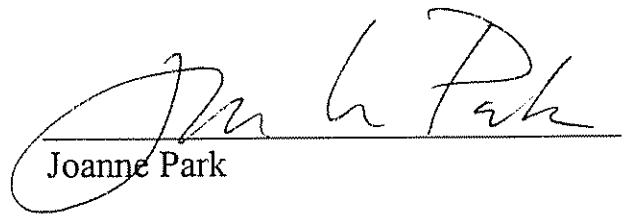
I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct; that this declaration is executed on March 25, 2004, at San Francisco, California.



Joanne Park